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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

WILDEARTH GUARDIANS, Plaintiff, v. LISA JACKSON, in her official capacity as Administrator of the Environmental Protection Agency, Defendant.	)	Case No. 3:11-CV-05651-YGR DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST CLAIM NOTICED FOR HEARING MARCH 13, 2012 AT 2:00 PM

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The first claim in the complaint filed by WildEarth Guardians asserts that Lisa Jackson, Administrator, United States Environmental Protect Agency ("EPA") has a mandatory duty enforceable through section 304(a) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a) ("the citizen suit provision") to promulgate regulations to prevent the significant deterioration ("PSD") of air quality within two years after EPA *promulgates or revises* a National Ambient Air Quality Standard for a particular pollutant. *See* Complaint ("Compl.") ¶¶ 31-36 (citing CAA section 166(a), 42 U.S.C. § 7476(a)). Guardians alleges that EPA breached this duty by failing to promulgate PSD rules within two years of March 12, 2008, when the Agency promulgated revisions to the ozone NAAQS. *See* 73 Fed. Reg. 16,511 (Mar. 27, 2008) (codified at 40 C.F.R. § 50.15) ("2008 Revised Ozone NAAQS"). Compl. ¶¶ 31-36.

For the reasons set forth below and in EPA's prior memorandum, Guardians' argument must be rejected as inconsistent with the plain language of section 166(a). Guardians fails to squarely address the actual language Congress used in section 166(a) and instead argues that the PSD program would function more effectively if EPA were required to promulgate the PSD rules each time a NAAQS is revised. These policy arguments must be addressed to Congress; the federal courts must apply the statute as written, not as it could or how Guardians believes it should have been written. Finally, Guardians contends that EPA has previously recognized that section 166(a) does impose a mandatory duty to issue PSD regulations when a NAAQS is revised. As explained below, in making these arguments, Guardians takes certain statements out of context.

The Court's jurisdiction under the citizen suit provision is limited to compelling EPA to perform duties that are nondiscretionary. Guardians fails to establish that section 166(a) imposed a mandatory duty for EPA to promulgate PSD rules for ozone within two years after it revised the ozone NAAQS. Accordingly, Guardians has failed to establish that the Court has jurisdiction over the first claim in its complaint, and that claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

ARGUMENT

I. GUARDIANS HAVE FAILED TO SHOW THAT SECTION 166(a) IMPOSES A NONDISCRETIONARY DUTY THAT EPA HAS FAILED TO PERFORM

A. Guardians' Argument Is Inconsistent With the Plain Language of Section 166(a).

Much of Guardians' opposition is devoted to policy arguments as to which interpretation of section 166(a) will most effectively implement the NAAQS and to analyzing past statements by EPA. The Supreme Court, however, has made clear that such arguments should not be considered when there is no ambiguity in the plain language of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."). In this matter, Guardians' claim can be dismissed based on the plain language of section 166(a) alone.

Section 166(a) provides:

> In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

42 U.S.C. § 7476(a). EPA's obligations with respect to ozone are defined by the first sentence, which requires only the promulgation of regulations within two years after August 7, 1977. (Ozone is the chemical species indicator used for photochemical oxidants.).[1]

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[1] In 1971, EPA issued NAAQS using "photochemical oxidants" as the chemical species indicator. 36 Fed. Reg. 8186 (April 30, 1971). EPA revised these NAAQS in 1979 and, as part of the revision, modified the indicator for the standard to focus on "ozone" because it was the photochemical oxidant measured to implement the original standard. EPA thus changed the title of the NAAQS to refer to "ozone" rather than "photochemical oxidants." 44 Fed. Reg.

Guardians does not seek relief for any alleged violation of a duty imposed by this sentence, however. Instead, Guardians contends that the 2008 Ozone Revisions triggered a mandatory duty under the second sentence. Guardians claims that the second sentence of section 166(a) requires the promulgation of new PSD regulations within two years after EPA promulgates *or revises* a NAAQS after August 7, 1977, even though the sentence uses only "promulgate" and does not mention revision. *See* Opp. at 8. Guardians tries to justify reading an obligation plainly applicable when EPA *promulgates* a NAAQS for an additional pollutant to also apply when EPA *revises* an existing NAAQS by arguing that there is no difference between the two terms so that the statutory term "promulgation" should be read as including "revision." *Id.* (arguing that EPA's distinction between promulgation and revision of a NAAQS "elevates form over substance to an absurd decree.").

Guardians' claim that Congress intended that, in section 166(a), "promulgate" should be read to include "revise," Opp. at 14, is rebutted by the numerous provisions of the CAA that demonstrate that where Congress intended for a mandatory duty to be triggered by either promulgation or revision of a NAAQS, Congress said so explicitly:

1. Section 109(d)(1) requires that, every five years, EPA must review the air quality criteria published under CAA section 108 and the NAAQS promulgated under section 109(a) "and shall make such *revisions* in such criteria and standards and promulgate such new standards as may be appropriate." (emphasis added).

2. Section 110(a)(1) requires that the States shall submit SIPs "within 3 years (. . .) of the promulgation of a [NAAQS] (*or any revision thereof*)." (emphasis added).

3. Section 107(d)(1)(B)(i) requires that "[u]pon promulgation *or revision* of a [NAAQS]," the Administrator shall promulgate certain submitted designations of areas as being in nonattainment, attainment, or unclassifiable, "as expeditiously as practicable, but in no case

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8202, 8219-20 (Feb. 8, 1979. *See American Petroleum Inst.v. Costle*, 665 F.2d 1176, 1186 (D.C. Cir. 1981).

later than 2 years from the date of promulgation of the new or *revised* [NAAQS]." (emphasis added).

4. Section 307(d)(1)(a) makes specific rulemaking requirements applicable to "the promulgation *or revision* of any [NAAQS]." (emphasis added).

42 U.S.C. §§ 7409(d)(1), 7410(a)(1), 7407(d)(1)(B)(i), 7607(d)(1)(a). *See* EPA Memo at 8-9.

In deciding which interpretation of section 166(a) is correct, the Court must consider the statute as a whole. Contrary to Guardians' suggestion, the Court cannot simply ignore EPA's demonstration that Congress considered "promulgation" and "revision" to have different meanings. Otherwise, Congress' inclusion of the words "revision" or "revise" in each of these provisions would be redundant and meaningless. This outcome contradicts a basic rule of statutory construction: the Court "must, if possible, construe a statute to give every word some operative effect." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004). *See also Beisler v. C.I.R.*, 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.").

Accordingly, the Court should reject Guardians' claim that the word "promulgated" in section 166(a) should be construed as including "revised." Instead, the Court should recognize that Congress regarded promulgation and revision as different events and conclude that its omission of any command to revise PSD rules or take action after a NAAQS *revision* should be construed as showing that Congress did not intend to impose any such mandatory duty. *See Marley v. United States*, 567 F.3d 1030, 1037 (9th Cir. 2009) ("Where Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).

Moreover, Guardians overlooks plain language that restricts application of the second sentence of section 166(a) to "pollutants" for which ambient air quality standards are established after the specified date. In addition to inserting the word "revisions" where it is not used, Guardians' interpretation would rewrite the second sentence to make it applicable "[i]n the case of … national ambient air quality standards … promulgated after August 7, 1977" while omitting the key language limiting the applicability of this sentence to "pollutants for which" NAAQS "are promulgated" after this date. If this language is not plain enough on its face, the placement of this language in context with section 163 of the Act and the first sentence of section 166(a) makes even more clear that EPA's revision of the ozone NAAQS in 2008 did not trigger a mandatory duty for EPA to promulgate or revise any PSD regulations applicable to ozone.

Section 163 of the Act established specific maximum allowable concentrations, often called PSD increments, for particulate matter and sulfur dioxide. 42 U.S.C. § 7473. The pollutants covered by section 163 have been described by EPA and the courts as the "set I" pollutants while the pollutants covered by the first sentence in section 166(a) are known as the "set II" pollutants. *Environmental Defense Fund, Inc. v. United States Environmental Protection Agency*, 898 F.2d 183, 184 (D.C. Cir. 1990). As discussed above, ozone is among the "set II" pollutants covered by the first sentence of section 166(a) of the Act. Within this context, it is clear that the second sentence of section 166(a) was primarily intended to cover additional pollutants "for which" a NAAQS is promulgated at a later date. Although EPA has previously acknowledged that the second sentence of section 166(a) may be read to apply to a different form (or indicator) of a pollutant that is included in "set I," this is insufficient to establish that EPA has a mandatory duty to promulgate new regulations under section 166 when the Agency revises a NAAQS without altering the form of the pollutant covered by the NAAQS.

B. Guardians Fail to Show That Applying Section 166(a) As Written Would Produce an Absurd Result.

In evaluating Guardians' argument, it is important to remember that the question before the Court is limited to the issue of whether the 2008 Ozone NAAQS Revision triggered a *mandatory* duty for EPA to promulgate PSD rules within two years. EPA's position on the proper interpretation of the statute with respect to that question does not limit the Agency's *discretionary* authority to take such action.

Guardians contends that to construe section 166(a) as reflecting Congress' deliberate omission of "revision" would produce an absurd result. Opp. at 14 (citing *United States v.*

Begay, 622 F.3d 1187, 1197 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 3026 (2011) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")). Guardians maintains that it would be absurd to interpret the CAA as establishing a mandatory duty for EPA to review and revise the NAAQS every five years, but not a mandatory duty to promulgate PSD rules on the same schedule. According to Guardians, the PSD rules must be revised so that the reductions to be accomplished will correspond to the standards set forth in a revised NAAQS.

Much of Guardians' argument hinges on the perceived need to recalibrate the increments used in the PSD rules to ensure that they correspond to the revised NAAQS. This is a particularly weak basis for its argument because section 166(a) does not require EPA to establish the values of PSD increments by using a percentage of the NAAQS that arguably must be continually recalibrated. *Environmental Defense Fund, Inc.*,898 F.2d at 185. In the *EDF* case, the D.C. Circuit made clear that many factors must be considered in establishing the form of the regulations promulgated under section 166 and that such regulations need not necessarily correspond to the characteristics of the NAAQS covering the same pollutant for which section 166 regulations are promulgated. Furthermore, though Congress contemplated that EPA might establish increments for the set II pollutants identified in section 166(a) to fulfill the requirements of section 166, Congress did not require that EPA use such values to meet the requirements of section 166(c)-(d) of the Act. *Id.* at 185, 190.

Moreover, in order to accept Guardians' argument, the Court would have to characterize other provisions of the CAA as absurd. In CAA section 163 ("Increments and Ceilings"), enacted in 1977, Congress established specific maximum allowable increases for the pollutants sulfur oxide ("SO_2") and particulate matter ("PM").[2] Congress did not consider it necessary to mandate that EPA update these increments and ceilings if existing NAAQS for these pollutants are updated. *See also* section 165(d)(2)(C)(iv)(incorporating these limitations into permitting process).

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2 These limits serve the same function as the "specific numerical measures against which permits can be evaluated" for "other pollutants" required for PSD rules by section 166(c).

In 1990, Congress amended section 166 to add section 166(f), which provided that "the Administrator is *authorized*" to promulgate new "maximum allowable increases" for PM_{10} to substitute for the increases in sections 163 and 165. (emphasis added). Congress did not mandate that EPA must revise the maximum allowable increases, but only provided the authority to do so. Moreover, Congress did not adopt a similar provision authorizing changes with respect to the SO_2 increments established in section 163 through section 166. EPA has never published a proposal to revise the statutory SO_2 increments despite several revisions of the SO_2 NAAQS. These provisions establish that Congress did not conclude that periodic mandatory revisions of the PSD rules were necessary for the PSD program to function effectively, and further refute Guardians' claim.

There is also a very practical reason that each NAAQS revision may not require a revision to the PSD rules even to maintain the symmetry sought by Guardians. A change in the NAAQS may be too small to warrant a change in the PSD rules. Thus, it is sensible to conclude that Congress deliberately decided against mandating a revision of the PSD rules each time a NAAQS is revised.

Guardians also seem to suggest that an EPA rulemaking action under section 166(a) of the Act is necessary to apply the 2008 ozone NAAQS in the PSD permitting program. This is plainly not the case, as section 165(a)(3) of the Clean Air Act specifies that a permit applicant must demonstrate that its proposed construction will not cause or contribute to a violation of "any" NAAQS. 42 U.S.C. § 7475(a)(3); *see also* 40 C.F.R. § 51.166(k)(1); 40 C.F.R. § 52.21(k)(1). EPA has long interpreted the PSD permitting criteria to apply to each new or revised NAAQS as of the date the NAAQS becomes effective unless EPA provides otherwise. 52 Fed. Reg. at 24,612, 24,682 n.9 (July 1, 1997). The D.C. Circuit held long ago that EPA action under section 166 is not a prerequisite to implementing PSD permitting requirements for individual pollutants covered by a NAAQS. *Alabama Power Co. v. Costle*, 636 F.2d 323, 405-06 (D.C. Cir. 1980).

C. EPA's Prior Statements Do Not Contradict the Agency's Present Argument

Guardians claims that EPA has previously interpreted section 166(a) as imposing a mandatory duty to promulgate PSD rules within two years after promulgating a NAAQS. Opp. at 9-10. First, this argument is not relevant because the statute is clear. Agency statements regarding the proper interpretation are relevant where the statute is ambiguous on its face. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Second, even if the statute were ambiguous, Guardians takes the quotations on which it relies out of context.

1. $PM_{2.5}$ Rulemaking

Guardians seeks to rely on language in a preamble to a final rule in which EPA cited its authority under section 166(a) in promulgating PSD rules for $PM_{2.5}$. Opp. at 10 (quoting 75 Fed. Reg. 64,864, 64,880 (Oct. 20, 2010)). Guardians suggests that EPA's description of section 166(a) supports Guardians' claim that section 166(a) requires EPA to establish PSD rules after revising an existing NAAQS, as well as after EPA has promulgated a NAAQS for an additional pollutant. Guardians' error is that it assumes that the $PM_{2.5}$ NAAQS, promulgated in 1997, must be treated as a revision to an existing NAAQS. In preamble to the $PM_{2.5}$ PSD rules, however, EPA explained that it was relying on authority under section 166(a) to promulgate the PSD rules because

> for purposes of section 166(a), the promulgation of a NAAQS for $PM_{2.5}$ established a NAAQS *for an additional pollutant* after 1977.

Id. at 64,871 ("Rationale for the Applicability of Section 166(a)") (emphasis added). Guardians simply ignores this language, which plainly rebuts Guardians' claim that EPA had concluded that section 166(a) required EPA to promulgate PSD rules after revising a NAAQS. In fact, EPA's conclusion regarding the applicability of section 166(a) is exactly the position that EPA advocates here: section 166(a) applies when a NAAQS is promulgated for an additional pollutant, not where an existing NAAQS for a pollutant is revised.

2. PM_{10} Rulemaking

Guardians also seeks to rely on language from EPA's preliminary efforts in 1985 and 1987 to address PSD rules for PM_{10}. Opp. at 12 (citing 50 Fed. Reg. 13,130, 13,148 (April 2, 1985) and 52 Fed. Reg. 24,672, 24,685 n.16 (July 1, 1987)). Like the $PM_{2.5}$ NAAQS promulgated by EPA in 1997, the PM_{10} NAAQS promulgated in 1987 established a new "pollutant" indicator for the NAAQS not previously used. Thus, even if EPA's proposed actions in the 1980's with respect to PM_{10} could have established an EPA interpretation of section 166, at most they show that EPA considered applying section 166 in a specific situation where EPA had "revised" the NAAQS to add a different form of a pollutant from what EPA had previously regulated. The 1980's proposals cited by Guardians are specific to this situation and do not stand for the general proposition that any revision of a NAAQS triggers a mandatory duty for EPA under section 166 of the Act.

Furthermore, to the extent either of these broader rulemakings addressing PM_{10} actually proposed regulations for PM_{10} under section 166 of the Act, these actions were superseded by a subsequent EPA proposal that was focused solely on establishing PSD increments for PM_{10} under section 166 of the Act. 54 Fed. Reg. 41,218 (Oct. 5, 1989). The following passage from that action reflects an evolution in EPA's understanding of the extent to which section 166 was applicable to the establishment of a NAAQS for a new form of a pollutant for which Congress had established PSD increments:

> It is not as clear from the face of the statute, however, how Congress intended section 166 to be applied to the circumstances here, where the particulate matter NAAQS and control strategy are redirected to an entirely new indicator (PM_{10}). The EPA, therefore, was faced with the questions of whether section 166 applies to the unique situation presented by PM_{10} and, if so, how it applies.

54 Fed. Reg. at 41220.

Following this proposal, EPA did not take final action to establish PSD regulations for PM_{10} until 1993. 58 Fed. Reg. 31,622 (June 3, 1993). EPA noted that commenters had disputed its authority to act under section 166. *Id.* at 31,624. EPA did not respond to these comments by announcing a final interpretation of section 166(a). Instead, EPA relied upon section 166(f) which expressly authorized the Agency to adopt PM_{10} increments, and obviated any need for EPA to evaluate its authority under section 166(a). *See id.* at 31,624-25. Section 166(f) was added to the CAA in 1990, subsequent to the notices cited by Guardians, and specifically authorizes EPA to promulgate regulations substituting new increments to replace the maximum allowable increases established by Congress in section 163. Thus, when the PM_{10} rulemakings are considered as a whole, it is clear that, in taking final action on the PSD rules, EPA did not rely on section 166(a), much less conclude that this provision establishes a mandatory duty for EPA to promulgate PSD rules subsequent to the revision of a NAAQS promulgated before 1977.

3. De Minimis Values

Finally, Guardians incorrectly allege that its position is supported by EPA's action in 1987 to revise its PSD regulations to add a variety of de minimus or screening values for PM_{10} (distinct from the PSD increments for PM_{10}). Guardians cannot show that EPA's actions in this part of the rulemaking were in any way based on section 166 of the Act. Consistent with the holding by the D.C. Circuit in *Alabama Power*, 636 F.2d at 405-06, section 166 of the Act is not the exclusive means through which EPA may establish PSD requirements for pollutants. The fact that EPA updated these values once in 1987 to conform to the PM_{10} NAAQS adopted at the same time does not show anything with respect to EPA's interpretation of section 166 of the Act. Furthermore, Guardians allege EPA revised these values again after revisions to the PM_{10} NAAQS in 1997 and 2006 (which did not change the pollutant indicator), but cite no EPA rulemaking to substantiate this claim.

Accordingly, Guardians' argument that EPA's litigation position is inconsistent with that adopted by the Agency in promulgating regulations must be rejected.

CONCLUSION

Because Guardians' first claim is not premised on a duty that Congress established as nondiscretionary under section 166(a), this claim falls outside the scope of the Court's jurisdiction under the citizen suit provision of the CAA, 42 U.S.C. § 7604(a), and so must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

Respectfully submitted,

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